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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

NO. 71-654

MARGARET LOVISI,
Petitioner

v.

COMMONWEALTH OF VIRGINIA

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE COMMONWEALTH OF VIRGINIA

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OPINIONS BELOW

The Supreme Court of Appeals wrote no opinion in affirming the judgment of conviction by denying a writ of error. The trial judge's oral opinion denying the motion to set the verdict of the jury aside as being contrary to the law and the evidence is not reported.

JURISDICTION

1. The Supreme Court of Appeals denied review on June 15, 1971. On September 2, 1971, this Honorable Court entered an order extending time to file petition for writ of certiorari up to and including November 12, 1971.

2. The federal question was raised as shown below.

3. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3).

QUESTION PRESENTED

Whether a search of the petitioner's private residence for pornographic literature and/or pictures constitutes an invasion of privacy and an illegal search and seizure pursuant to the First, Fourth, and Fourteenth Amendments to the United States Constitution, and did the admission of such evidence affect petitioner's due process under the law?

CONSTITUTIONAL PROVISIONS INVOLVED

1. The First, Fourth and Fourteenth Amendments to the Constitution of the United States are sufficiently familiar as not to require quotation.

STATEMENT

Petitioner, a housewife, in the City of Virginia Beach, Virginia, stands convicted of arson and is in consequence under a sentence of confinement in the state penitentiary for a period of five years.

The details of the evidence are to the effect that two members of the Virginia Beach Police Department, armed with a search warrant to search for pornographic literature and/or pictures came upon the residence of the petitioner and shortly thereafter found themselves fighting a fire in the home of the petitioner. It was the contention of the prosecution that the intent of the petitioner was to burn down the house to keep the police officers from obaining any evidence that was contained in the attic of the house.

After the fire or fires had been put out the police officers went on to seize not only what ever constituted pornographic literature and/or pictures in the minds of the police officers (Tr. P. 47) but went on to seize private mail and correspondence of the petitioner and her husband, Playboy magazines, paper back novels, a coin collection belonging to the husband of the petitioner, numerous rifles and handguns belonging to the petitioner's husband, a box of ammunition also belonging to the petitioner's husband, also personal papers belonging to the husband.

Following petitioner's conviction of arson, counsel moved to set the verdict aside as being contrary to the law and evidence. Said motion was overruled by the trial judge. The case was heard before the trial judge, sitting without a jury.

Petitioner then made application to the Supreme Court of Appeals, Virginia's highest Court, for a writ of error which was denied: ". . . the Court being of opinion that there is no reversible error in the judgment complained of, doth reject said petition and refuse said writ of error and supersedeas, the effect of which is to affirm the judgment of the said Circuit Court."

HOW THE FEDERAL QUESTION WAS RAISED

1. Numerous times during the trial petitioner objected to the introduction of those items seized from her residence on the grounds that they were prejudicial, and immaterial and violated the petitioner's constitutional rights.

2. The same contention of violation of constitutional rights was contained in petitioner's arguments to set aside the finding of guilt.

3. It was repeated in petitioner's Petition for Writ of Error, seeking review of her conviction by the Commonwealth's highest court.

REASONS FOR GRANTING THE WRIT

In this, a trial for arson, we find admitted into evidence some twenty-one boxes of films, pictures and books alleged to be pornographic in nature. It is also interesting to note that under the same search warrant which was issued to seize pornographic pictures and/or literature, numerous guns were seized, along with ammunition, coins, family pictures, first class mail and other odds and ends including Playboy magazines and other items of a purely personal nature. The Fourth Amendment to the Constitution of the United States provides that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

It is submitted that the affidavit was void on its face since it did not state any time of occurrence. The requirement that an affidavit for a search warrant state the time of the occurrence of the facts relied upon is based on the necessity that there exist at the time the warrant is issued probable cause for believing that the facts relied upon still continue to exist. Simultaneity is of course, normally impossible, but just how long a time may be permitted to elapse without destroying the basis for a reasonable belief as to the continuance of the situation set forth in the affidavit will vary according to the facts of the individual case. All that might be stated in the way of a general rule is that the Courts will require that no more than a "reasonable" time have elapsed, the nearer the time at which

the facts occurred is to the time when the affidavit was made, the more probable it being that the affidavit will be held to justify a conclusion of probable cause. See *Sgro* v. *United States*, 287 U.S. 206, 53 S.Ct. 138. In the instant case the affidavit merely recites that in the "past" various events had taken place. There was absolutely no effort to ascertain when these events might have taken place. It is utterly vague to say the least.

It is respectfully submitted that in order to introduce allegedly obscene and pornographic material that the burden shifts to the Commonwealth to affirmatively show to the Court how it came in possession of the obscene material and whether or not a prior adversary hearing had been held prior to the seizure of the material. In the instant case the petitioner had filed a motion to suppress all evidence seized at her home. The motion was overruled by the trial court and numerous items seized at the house were introduced over the objection of the petitioner. While it is true that this was a trial for arson and not for obscene matter it is submitted that the introduction of all of this matter could not but have prejudiced the case of the petitioner, and regardless of the nature of the trial it is submitted that the ground rules for introducing obscene matter remain the same. The petitioner could not help but be prejudiced in her effort to obtain a fair and impartial trial once the trial court had viewed her portrayed in allegedly obscene poses in various poloroid photos that we submit were illegally seized. A prior adversary hearing was essential since possession of obscene matter in the privacy of one's home is not per se illegal. *Stanley* v. *Georgia*, 394 U.S. 557, 89 S. Ct. 1243 (1969). This Honorable Court has been quite vigilant in upholding the Fourteenth Amendment's requirement that regulation by the states of obscenity conform to procedures that will insure against the curtailment of constitutionally protected expression, which is

often separated from obscenity only by a dim and uncertain line. See, *Bantam Books, Inc.* v. *Sullivan,* 372, U.S. 58, 83 S. Ct. 631 (1963). This Court has spelled out rather clearly that law enforcement officers cannot seize allegedly obscene publications without a prior adversary proceeding on the issue of obscenity. See also, *A Quantity of Copies of Books* v. *Kansas,* 378 U.S. 205, 84 S. Ct. 1723 (1964). *Burgin* v. *South Carolina,* 40 L.W. 3142.

It is respectfully submitted that for the police officers to enter upon the residence of the petitioner and conduct a general search thereon clearly constitutes an invasion of privacy. See, *Griswold* v. *Connecticut,* 381 U.S. 479 (1965).

CONCLUSION

For the foregoing reasons, we respectfully submit this petition for a writ of certiorari should be granted.

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VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Tuesday, the 15th day of June, 1971.

The petition of Margaret Lovisi for a writ of error and supersedeas to a judgment rendered by the Circuit Court of the City of Virginia Beach on the 14th day of October, 1970, in a prosecution by the Commonwealth against the said petitioner for a felony (Arson), having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that there is no reversible error in the judgment complained of, doth reject said petition and refuse said writ of error and supersedeas, the effect of which is to affirm the judgment of the said circuit court.

A Copy,

Teste:

Howard G. Turner, Clerk

By:

/s/R. P. TOMLINSON
Deputy Clerk